United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

w/ affidavit

74-1896

To be argued by
ROBERT M. JUPITER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1896

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—against—

THEODORE DELMAR, BARBARA DELMAR a/k/a BARBARA KAUFMAN, DANIEL M. GENTILE, LEON GOLDMAN, LOU MARTI, et al.,
Defendants,

STUYVESANT INSURANCE COMPANY,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE PLAINTIFF-APPELLEE

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the Appellee, United States of America.

ROBERT M. JUPITER,
PAUL H. SILVERMAN,
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Statement of the Case

The appellant Stuyvesant Insurance Company "Stuyvesant") appeals from the decision and order (28a)* of the Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, filed on May 13, 1974, denying Stuyvesant's motion to vacate forfeiture

* Appendix references will be indicated by a number followed by the letter "a". Judge Metzner's opinion has not been officially reported.

of bail as to defendant Lou Marti, stemming from *United States* v. *Marti, et al.*, 67 Cr. 986 (S.D.N.Y.), *reversed*, 421 F.2d 1263 (2d Cir. 1970).

Lou Marti and nine others were charged with conspiring to transport obscene pictures in interstate commerce in violation of Title 18 U.S.C. § 1465. *United States* v. *Delmar, Marti, et al.*, 67 Cr. 986 (S.D.N.Y.), filed December 1, 1967.*

On December 19, 1967, Marti pleaded not guilty. Bail was fixed in the sum of $2,000.00. On January 30, 1968, the amount of the bail was increased to $25,000.00.

On January 7, 1969, the jury trial against Marti and Lou Saks commenced before Judge Charles H. Tenney. On January 30, 1974, after more than three weeks of trial, the jury returned a verdict of guilty against defendants Marti and Saks. Upon the finding of guilt, the amount of Marti's bail was increased to $35,000.

On March 14, 1969, Marti was sentenced by Judge Tenney to imprisonment for two years. Bail was continued, in the amount of $35,000, pending appeal with directions that the bail bond be rewritten.

On March 20, 1969, Public Service Mutual Insurance Company executed a bail bond in the amount of $35,000 for the release of Marti. Thereafter, on June 20, 1969, the Public Service Mutual Insurance Company withdrew its bail bond, which was substituted by Stuyvesant's bond in the amount of $35,000, on behalf of Marti. Stuyvesant's bond provided in relevant part that the principal, Lou Marti:

> . . . shall appear before the District Court of the United States for the Southern District of New York on such day or days as shall be set for retrial of said

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* The indictment was ordered sealed and bench warrants were issued.

> case, provided the judgment of the District Court of the United States for the Southern District of New York is reversed by the said United States Court of Appeals; and shall not depart the jurisdiction of the District Court of the United States for the Southern and Eastern District of New York without leave.
>
> . . .

On April 20, 1970, the Order of the Court of Appeals reversing defendant's conviction was filed in the District Court. On reversal, the $35,000 bond remained in effect.

On October 13, 1970 Marti commenced a jury trial before the Honorable Lloyd F. MacMahon, United States District Judge of the Southern District of New York, in another obscenity case, 69 Cr. 747 (S.D.N.Y.). On October 28, 1970, the jury found Marti guilty and on December 7, 1970 he was sentenced to two years in prison and fined $15,000.

On December 12, 1970, a pre-trial conference was held before Judge Metzner regarding the retrial of the charges in 67 Cr. 986 (S.D.N.Y.). At that time the Court was advised that Marti had been convicted in a second case before Judge MacMahon, and that an appeal from the second conviction was then pending. In addition, Marti was scheduled to go on trial in the Eastern District of New York on January 11, 1971 on charges of interstate theft. Counsel for Marti and the Government agreed that the case before Judge Metzner could be adjourned pending appellate review of Marti's conviction in 69 Cr. 747 (S.D.N.Y.) (29a).

On June 1, 1971, at another pre-trial court conference, Judge Metzner was informed that the Court of Appeals had not yet issued a decision on Marti's appeal from the second conviction.*

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* On July 7, 1971, Marti's conviction on 69 Cr. 747 was affirmed by the Court of Appeals. *United States* v. *Manarite*, 448 F.2d 583 (2d Cir. 1971).

On June 29, 1971, Marti filed a motion to dismiss 67 Cr. 986 (S.D.N.Y.). On September 28, 1971 Judge Metzner denied Marti's motion and scheduled the retrial for January 4, 1972. The scheduled date for the retrial was again suspended. On November 1, 1971, at another court conference, the Court and the counsel for the Government consented to await the decision of the United States Supreme Court upon Marti's application for writ of certiorari from the Court of Appeals' affirmance of Marti's conviction in 69 Cr. 747 (S.D.N.Y.).* Counsel for Marti advised the Court that he had requested that the Supreme Court withhold action on Marti's petition for a writ of certiorari until that Court decided another case involving the same obscenity issue.**

On December 16, 1971, Marti failed to appear at a scheduled hearing in the United States District Court for the Eastern District of New York.

The following day he failed to surrender to serve his sentence on his conviction in 69 Cr. 747. A bench warrant was issued and his bail in that case forfeited.

Notice was sent to Marti of a hearing to be held on February 4, 1972, before Judge Metzner (30a). Marti failed to appear. The court was advised that he had moved and left no forwarding address, and that he had left the jurisdiction. Judge Metzner forfeited Marti's bail *** and ordered that a warrant be issued.

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* On November 9, 1971 the Supreme Court denied certiorari. *Marti* v. *United States*, 404 U.S. 947.

** *United States* v. *Orito*, 413 U.S. 139 (1973).

*** The endorsement on the back of the indictment 67 Cr. 986 reads as follows: "No appearance by Defendant Lou Marti. Bail $50,000 forfeited. Beach Warrant Issued. Metzner, *J.*"

The erroneous reference to $50,000 bail may have arisen because the defendant had other matters pending at this time in both the Eastern District and Southern District of New York.

[Footnote continued on following page]

Stuyvesant had both actual and constructive notice of Marti's fugitive status. It is sufficient for purposes of this appeal to note that Marti's non-appearance in Court in the Southern District of New York in 69 Cr. 747 was noted on the Docket Sheet in that action (where Stuyvesant was also surety) on the date of his default, December 17, 1973. In addition, while it is not in the record of this case, the Government sent a letter to Stuyvesant on January 14, 1972, advising the surety of the forfeiture on December 17, 1971 of Marti's $10,000 bond in 69 Cr. 747. The text of the letter is reproduced in the margin of the brief.*

[Footnote continued from preceding page]
In the Order signed by Judge Tenney on August 26, 1969 (Portion of Record Docketed on appeal), extending the bail limits to permit the defendant to visit his ailing father for one week in Puerto Rico, attorneys for defendant Marti referred to a combined bail on the three cases amounting to $50,000.

The Government is seeking $35,000, the amount indicated in the bond, not the larger amount.

* January 14, 1972

"Stuyvesant Insurance Co.
877 Brook Avenue
Bronx, New York

Re: Bail Bond Forfeiture- -Louis Marti

Gentlemen:

Please be advised that on December 17, 1971 the $10,000 bond posted by you on behalf of Louis Marti was ordered forfeited to the United States. Accordingly, would you kindly forward to the undersigned your certified check or money order within ten days in the amount of $10,000.00.

In the event you fail to comply with the aforementioned, I will be constrained to secure judgment against you in the amount of $10,000.00.

Very truly yours,

WHITNEY NORTH SEYMOUR, JR.
United States Attorney

By: DAVID E. TOLBIN
Assistant U.S. Attorney
Chief, Claims Unit"

Finally, approximately one year before Stuyvesant moved to set aside the forfeiture in the District Court in the instant case, it filed a similar application before Judge MacMahon in 69 Cr. 747. There, as here, the moving affidavit was signed by Paul Eichler, as bondsmen, Mr. Eichler's affidavit of April 8, 1973, submitted to Judge MacMahon in 69 Cr. 747, indicates that Eichler then had actual knowledge of Marti's fugitive status. Stuyvesant's suggestion (Appellant's Brief at 6 and 17) that it was not notified of Marti's flight until two years after the forfeiture was declared, that is, until the Government's demand for payment in the Spring of 1974, is thus directly rebutted by the sworn statement of Stuyvesant's bonding agent in the instant case, Paul Eichler.

The Government undertook to return this fugitive to justice; this necessitated an extensive search throughout mainland United States, Puerto Rico and South America. The Government agents had to follow a long and tangled trail. They had to interview numerous persons, including attorneys, relatives, public officials. They had to enlist the aid of other law enforcement agencies both here and abroad. They perused birth records, hotel records and other documents in New York, Puerto Rico and Ecuador (21a-22a, 33a).

After a long and extensive search, the defendant was located in Guayaquil, Ecuador. This was where defendant had fled the country to avoid prosecution. In this foreign city he sought to make a claim of citizenship. After the exertion of considerable effort by the Federal Bureau of Investigation, this Government was able to prove that he was not a citizen of that country and he was ejected therefrom (21a).

He arrived in Miami on March 15, 1973; was taken into custody by Government agents; arraigned before the United States Magistrate and waived removal to New York. Thus, the saga of this fugitive's 14-month flight to avoid the process of the Federal courts was terminated. It is well to add that his apprehension came about not through any

efforts of the surety but wholly through the diligent efforts of the Government pursuers. Marti has acted the part of the classic fugitive.

On April 10, 1973, Marti pleaded guilty to Count Two of the indictment 67 Cr. 986. He was sentenced by Judge Metzner on May 22, 1973 to a term of imprisonment of one year to run consecutively with the two-year sentence imposed on indictment 69 Cr. 747.

On March 19, 1974 the United States made demand upon Stuyvesant for collection of Marti's forfeited bail bond. On March 27, 1974—Stuyvesant responded by filing a motion for an order vacating the forfeiture of the bail bond pursuant to Rule 46(e)(2) Fed. R. Crim. Proc. On the basis of affidavits submitted by the parties, Judge Metzner denied Stuyvesant's motion. This appeal followed.

Rule Involved

Rule 46(e) of the Federal Rules of Criminal Procedure provides as follows:

> (e) Forfeiture.
>
> (1) Declaration. If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.
>
> (2) Setting Aside. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.
>
> (3) Enforcement. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court,

who shall forthwith mail copies to the obligors to their last known addresses.

(4) Remission. After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

Issue

Did the District Court abuse its discretion in finding that justice did require the enforcement of the forfeiture of the defendant Marti's bail bond?

ARGUMENT

The District Court did not abuse its discretion in finding that justice was served by forfeiting the bail bond since Stuyvesant presented no persuasive reason for its release as surety.

The appellant, Stuyvesant Insurance Company, has asserted five reasons why the forfeiture of Marti's bail bond should have been set aside by the District Court. Without expressly contesting any finding of fact made below, Stuyvesant argues that it is entitled to relief for the following reasons: (1) Marti's conviction in 67 Cr. 986 was reversed and remanded by the Court of Appeals two years before the forfeiture of the bail bond; (2) Stuyvesant received no notice of the hearing at which Marti defaulted and his bail bond was forfeited; (3) Marti subsequently appeared in court, pled guilty, and is now incarcerated; and (4) the delay between the forfeiture of the bail bond and the demand upon Stuyvesant for payment unduly prejudiced Stuyvesant and its bondsmen, Eichler, in its efforts to collect the amount of bail forfeited from the principal, Marti. None of these reasons, even if they were taken at face value, would justify vacating the bail forfeiture order; moreover, some of the stated reasons assume states of fact at variance with record evidence. The Government contends that relief under Rule 46(e)(2) of the Federal Rules of Criminal Procedure was properly denied by Judge Metzner.

Reversal of Marti's Obscenity Conviction

The fact that the judgment appealed from was reversed approximately two years prior to the forfeiture does not alter the responsibility of the bonding company. In this interval there was considerable activity by the Court and the Government to move this matter to trial. Deferral of the trial was largely necessitated by Marti's other criminal cases in the Southern District and Eastern District of New York, his appeals from conviction and in furtherance of counsel's request to put off the trial. Furthermore, the bond written by Stuyvesant required the surety to insure Marti's appearance in court at a retrial of the case, in the event of appellate reversal of his conviction. It is seriously misleading to suggest that the change in Marti's status from convicted defendant to indicted defendant facing retrial was such an alteration of the condition of the bond as to warrant release from forfeiture (Appellant's Brief at 7-8).

If Stuyvesant desired the bond to include a different time limitation it should have expressed its desires in the executed agreement with the Government. Furthermore, it was free at any time to surrender the defendant Marti to Federal custody to effect its exoneration as a surety. Rule 46(f), F.R.Cr. P. In executing the bond, Stuyvesant as surety accepted the conditions of the bond, which included assuring Marti's appearance. In any event, the surety "should keep itself posted of any changes made by the Court in accordance with the terms and purpose of the bond". *Stuyvesant Insurance Company* v. *United States*, 410 F.2d 524, 526 (8th Cir.), *cert. denied*, 396 U.S. 836 (1969).

Notification to Surety is Not Required

The assertion that the surety was never notified of the date of Marti's court appearance is irrelevant to the question of bail bond forfeiture. There is no requirement that the surety receive notice of the date of the court appearance

of his defendant. Notice to the surety is not a pre-condition to forfeiture of a bond. Rule 46(e)(1) F.R.Cr.P.; *United States* v. *Egan*, 394 F.2d 262, 266 (2d Cir. 1968), *cert. denied*, 393 U.S. 838 (1969); *Western Surety Co.* v. *United States*, 51 F.2d 470, 472 (9th Cir. 1931); *United States* v. *Caro*, 56 F.R.D. 16, 19 (S.D. Fla. 1972); *People* v. *Davis*, 168 Misc. 511, 5 N.Y.S. 2d 411 (Ct. Gen. Sess., 1938). Stuyvesant knew or should have known of Marti's fugitivity when its bail bond for Marti in 69 Cr. 747 (S.D.N.Y.) was forfeited on December 17, 1971, nearly one month before the critical court appearance in this prosecution.

Marti's Arrest, Plea and Imprisonment

The appellant states that after the bail forfeiture the defendant "subsequently appeared" (Appellant's Brief at 2). "Appeared" is hardly the proper description. On March 15, 1973, Marti was arrested in Miami, Florida, 1,500 miles away from the Southern District of New York and was brought to New York in the custody of government agents. This was hardly a voluntary appearance.

The fact that Marti pled guilty fourteen months after he was notified to be in Court does not of itself entitle the surety to a remission of the forfeiture. *United States* v. *Davis*, 202 F.2d 621 (7th Cir.), *cert. denied, sub. nom. Ferguson* v. *United States*, 345 U.S. 998 (1953). Nor does the fact that he was sentenced and incarcerated after his plea have any effect upon the forfeiture. *United States* v. *Davis, supra.*

Stuyvesant's further assertion that Marti's apprehension provides cause for the remission of its obligation on the bond is without merit. *Tennessee Bonding Co. Inc.* v. *United States*, 125 F.2d 138 (6th Cir. 1942). Stuyvesant, the surety on a bail bond, is not entitled to relief from forfeiture because of a subsequent arrest and eventual incarceration of principal after fleeing the jurisdiction and fail-

ing to appear in court. *United States* v. *Davis,* 202 F.2d 621 (7th Cir.), *cert. denied, sub. nom. Ferguson* v. *United States,* 345 U.S. 998 (1953); *United States* v. *Accardi,* 241 F. Supp. 119, *aff'd, sub. nom. United States* v. *Peerless Insurance Co.,* 343 F.2d 759 (2d Cir.), *cert. denied,* 382 U.S. 832 (1965); *United States* v. *DeStephano,* 102 F. Supp. 38 (W.D.C. Pa. 1956).

No Prejudice to Stuyvesant

Stuyvesant contends that the two year interval between the date of the forfeiture and the demand for payment prejudiced its abilities to recoup its loss, thereby justifying remission. This argument is without support in fact or in law.

In fact, Stuyvesant and the particular bonding agent were both aware of Marti's departure from this jurisdiction. By letter dated January 14, 1972 (*supra,* 5) they were notified that its bond posted on behalf of Marti had been forfeited on December 17, 1971. Thereafter, on April 8, 1973 Stuyvesant filed a Motion for Remission of Forfeiture in a different case, Docket No. 69 Cr. 747 (S.D.N.Y.). This motion was supported by an affidavit submitted by Paul Eichler, the same bondsman for the bond now in question.

In law, the bail bond is a contract. *United States* v. *D'Anna,* 487 F.2d 899 (6th Cir. 1973); *Williams* v. *United States,* 444 F.2d 742 (10th Cir.), *cert. denied, sub. nom. United Bonding Insurance Co.* v. *United States,* 404 U.S. 938 (1971). The bail bond contract was breached by Marti's flight to South America, thus making Stuyvesant, as surety, liable for the face amount of the bond. The forfeiture of bail as referred to in Rule 46(e), F.R.Cr.P. is a proceeding upon the breach of a condition of a contract. *Peerless Casualty* v. *United States,* 344 F.2d 495 (D.C. Cir. 1964). The United States may commence an action on a contract

within six years after the right of action accrues. Title 28 U.S.C. § 2415.

In the case of *United States* v. *Schlenvoght,* 294 F.2d 275, 276 (7th Cir. 1961), enforcement against a surety company was allowed more than four years after the forfeiture was ordered. Thus, the Government is well within the proper time period seeking enforcement of the bond.

In support of its appeal, Stuyvesant asserts that the particular bonding agent took no collateral for this bond. This omission, however commercially negligent, is certainly not a ground for remission. *United States* v. *Accardi, supra.* In *United States* v. *Bradley,* 43 F.R.D. 278, 280 (W.D. Pa. 1967) the Court stated:

> However, the financial plight of [bail bondsman's] agent and his relative experience or lack of it in the bonding business are not criteria on which Court may base its decision on remission. The important factors are (1) the extent of delay which defendant's failure to appear causes in prosecution of the case, and (2) the expenses which result to the Government in attempting to locate the defendant and securing his presence at the criminal trial.

See also *People* v. *Manufacturers Casualty Insurance Co.,* 144 N.Y.S. 2d 282, 208 Misc. 504 (Kings County Ct. 1955).

The very purpose of a bond would be thwarted if the United States were held to indemnify the surety for its poor business judgment. When a bondsman undertakes to execute a bond he accepts the increased hazards "if his faith is misplaced in the . . . principal" *United States* v. *Davis, supra* at p. 625.

In brief, Stuyvesant absolutely failed to meet its required burden of proof in the District Court to establish

that the remission of the forfeiture of the bail bond was required by justice in this case. *United States* v. *Accardi, supra.*

The appellant could not have been "severely prejudiced" since Stuyvesant was well aware of Marti's departure from this jurisdiction even prior to the forfeiture on February 4, 1972.

The Government's letter of March 19, 1974 was a demand for payment. Stuyvesant Insurance Co. and the bondsman already knew and had known from January 14, 1972 that their principal had decamped. They could have instituted any possible recourse at that early date. Their failure to obtain security is the reason for the bondsman's financial predicament. It is not the Government that is responsible for the bonding agent's financial difficulty. It is rather the arrangement that the bondsman has with the bonding company. The financial misfortunes of surety present no ground for exercise of discretion to remit. *United States* v. *Costello,* 47 F.2d 684 (6th Cir. 1931); *United States* v. *Bradley, supra; People* v. *Manufacturer's Casualty Insurance Company, supra.*

The entire purpose of a bail bond is to assure the presence of the defendant, and in default thereof, to pay the Government the sum stipulated in the bond. *United States* v. *Accardi, supra; United States* v. *Hickman,* 155 F.2d 897 (7th Cir. 1946). The Government did not accept the bonding agent as the surety; it accepted the Stuyvesant Insurance Company as the entity assuring Marti's appearance in court.

The decision below was not arbitrary. The Court carefully considered all of the factors Stuyvesant asserted and

then held that Stuyvesant had not met its burden of establishing that "justice does not require the enforcement of the forfeiture". Rule 46(e)(2), F.R.Cr.P.; *United States* v. *Accardi, supra.* Moreover, the Court found that justice would be better served by not setting aside the forfeiture (28a). In *United States* v. *Yim,* 348 F. Supp. 708 (C.D. Cal. 1972) the Court stated:

> . . . In the exercise of that discretion, it is the interests of justice—and not the interests of the movant—which must be considered. Id. at 710.

The setting aside of a forfeiture is discretionary with the District Court. Rule 46(e)(2), F.R.Cr.P.; *United Benefit Fire Insurance Company* v. *Untied States,* 306 F.2d 325 (9th Cir. 1962); *United States* v. *Caro, supra; United States* v. *Accardi, supra.*

United Benefit is similar to the present case. In *United Benefit* the defendant was charged with a federal crime. He was released on bail secured by a surety company bond. When his case was called he did not appear. His counsel stated that he was unable to locate the defendant. Two days later, upon the Government's motion the defendant's bail was declared forfeit. Thereafter, the defendant was located in Mexico through the "agencies of the United States Government". Id. at 326. However, in *United Benefit,* the defendant voluntarily surrendered to United States officials. He subsequently pleaded guilty and was sentenced to five years imprisonment. The surety company filed a petition for remission. The District Court denied the petition. On appeal, the Court of Appeals for the Ninth Circuit, quoting *Larson* v. *United States,* 296 F.2d 167, 170 (8th Cir. 1961), stated that "[i]t is only where there has been an abuse of discretion that an appellate

court may set aside the action of the District Court denying the remission of a forfeiture." Id.

The primary purpose of a "recognizance" or bail bond is to secure the presence of a defendant in court when required and it is to that obligation that the surety binds himself to the United States by contractual agreement. *United States* v. *Accardi, supra; United States* v. *Davis,* 47 F. Supp. 176 (E.D.C.N.Y. 1942), *aff'd.,* 135 F.2d 1013 (2d Cir. 1943). See *Williams* v. *United States, supra.*

Upon the failure of the principal, the criminal defendant, to appear at a Court specified time and place in respect of a criminal charge, the surety becomes an absolute debtor of the government for amount as written on the bond. *United States* v. *Foster,* 417 F.2d 1254, 1256 (7th Cir. 1969).

When defendant Marti failed to appear in court on February 4, 1972 and when the Court learned that Marti had fled the jurisdiction, then and there the surety on Marti's bond became absolutely liable for the full amount of the bond. *United States* v. *Foster, supra; Untied States* v. *Caro, supra.*

CONCLUSION

For the foregoing reasons, the decision of the District Court denying Stuyvesant's motion to vacate the bail forfeiture order should be affirmed.

Dated: New York, New York
September 30, 1974

Respectfully submitted,

PAUL J. CURRAN,
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Form 280 A-Affidavit of Service by Mail
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CA 74-1896

AFFIDAVIT OF MAILING

State of New York) ss
County of New York)

Pauline Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 30th day of September 1974 s he served two copies of the within appellee's brief

by placing the same in a properly postpaid franked envelope addressed:

Messrs. Bobick Deutsch & Schlesser,
149 West 72nd St.
New York, NY 10023

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Pauline Troia

Sworn to before me this

30th day of September 1974

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975